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## Review Article

## Putting Surveillance on the Political Agenda *A Short Defence of Surveillance, Citizens and the State*

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In February 2009 the House of Lords Constitutional Committee in the United Kingdom published the report *Surveillance: Citizens and the State*. Some have hailed this as a landmark document. Volume 6(3) of *Surveillance & Society* published 4 invited responses to this report written by prominent scholars. In the contribution below the two Specialist Advisers to this committee set the context for the report and provide a brief rejoinder to the four responses.

As the Specialist Advisers to the House of Lords Select Committee on the Constitution for its report, *Surveillance: Citizens and the State*,<sup>1</sup> we are grateful for the opportunity to respond to the commentaries published by Oscar Gandy, Katherine Hayles, Katja Franko Aas and Mark Andrejevic in *Surveillance and Society*, 6(3) 2009. We write in our academic and personal capacities, and not as representatives of the Committee.

We welcome the contributions made by the four commentators, not only because they give the report currency in circles beyond parliament and government, but also because their observations are extremely well informed and thought-provoking. Although the Committee was very concerned to ensure that the report would be accessible to lay readers, we believe that it should also be of great interest to surveillance scholars, privacy advocates, and civil liberties organisations. As such, we were heartened to read that all four commentators felt that the report makes a substantial contribution to our understanding of surveillance and data collection, and that it raises important questions and concerns. Yet while we agree wholeheartedly with many of the commentators' comments and criticisms, we believe that some of them are also misplaced, and perhaps reflect an understandable lack of knowledge of how parliamentary inquiries are carried out in the UK. This is hardly surprising given that the inquiry process is not an especially transparent one, and that committee reports do not typically contain anything like a

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<sup>1</sup> Second Report of Session 2008-09, HL Paper 18-I. The Government's response is Cm 7616 (13 May 2009); the Committee's reply is Fourteenth Report of Session 2008-09, HL Paper 114; the debate is House of Lords Official Report, Vol. 711, No. 93, 19 June 2009, cols. 1285-1312.

“methodology section.” As a consequence, it is perhaps helpful to begin this response with a description of the general inquiry process, and the steps that lead to the eventual publication of committee reports.

Inquiries undertaken by British parliamentary committees vary considerably in their length, breadth and depth. In general, they provide an opportunity for small sections of parliament to examine issues by gathering and analysing evidence, discussing relevant concerns and questions, and making recommendations to the Government or other bodies. This process is not intended to be comprehensive, nor are the reports produced by such inquiries meant to be a definitive account of the subject in question. In most cases, a degree of selectivity has to be exercised from the very start, and throughout the inquiry itself. As a result, there is always a danger that – in hindsight – the terms of reference for an inquiry may appear to have been drawn too narrowly or too broadly. It is important to note that it is not the aim of parliamentary committees to produce highly detailed, academic research studies. Whilst their reports may speak to knowledgeable specialists in the field, they must also anticipate interest from government ministers, politicians, officials and others who are involved in the relevant policy community, as well from as a wider audience including the media, civil society, and the public-at-large. In essence, committee reports are political documents, not scholarly treatises or opinion pieces. As a consequence, their influence and effectiveness depends on how they are received by policy-makers and parliament, and on whether they manage to capture the interest of the media and general public. Given that the Government is not obliged to accept the recommendations of a committee report, their success is highly dependent on how they are received and, to a large extent, on the direction of the political wind at the time they are published.

Committees of each House are made up of sitting members, who typically serve for a period of a few years. In the case of the Select Committee on the Constitution, there are twelve members who spend the majority of their time scrutinising bills and secondary legislation, questioning ministers and judicial figures (such as the Lord Chancellor and the Lord Chief Justice), and considering the constitutional implications of new policies and legislative proposals, such as the European Union’s Treaty of Lisbon and planned changes to the role of the Attorney General. In addition to these routine functions, parliamentary committees can also undertake inquiries into specific matters, the length and scope of the inquiry being relatively flexible. Given the range of functions carried out by these committees, however, any inquiry will only form part of the overall agenda, and as such must compete for time with the committee’s other responsibilities.

The level of interest shown by individual committee members in any given inquiry, and the extent of their prior knowledge of the particular issues, will naturally enough vary considerably depending on the subject under scrutiny. While members of the House of Lords and its committees are in most respects less party-political than in the House of Commons (in which some of them previously served), it is rare for them to speak with one voice or reach the same conclusion during the course of an inquiry. Given that convention requires a committee’s report to reflect a consensus of views, during the course of drafting there will be considerable discussion before any final recommendations are agreed upon. Following publication, the report will then be the subject of a formal Government response, a debate on the floor of the House, and possibly discussion in the mainstream media. Members are, therefore, very conscious of the fact that the report must be focused, comprehensible, and sufficiently trenchant to command respect and require the attention of those to whom its recommendations are principally addressed.

*Surveillance: Citizens and the State* is a comparatively lengthy parliamentary report, and it includes a large volume of written and oral evidence gathered over some twenty months. This is a long period for a committee to remain engaged and interested in a topic, and was considerably longer than anticipated. Because all of the recommendations made in a parliamentary report must be justified by reference to the evidence taken directly (and only sometimes indirectly) by the committee, it is inevitable that the scope of those recommendations will be somewhat limited. In particular, the emphasis on the need for direct evidence means that it rarely possible for a committee to look for additional evidence once the drafting the report is underway. Equally, it is difficult for a committee to consider issues that may have emerged once

the inquiry has been concluded but before the final report has been published, even if they are topical or relevant to the subject matter of the inquiry. Committees are also usually very conscious of the danger of delaying publication of their findings. Aside from the fact that the longer the gap between the conclusion of an inquiry and publication of the report the more likely it is that the evidence and findings will be overtaken by events, changes in the composition of the committee or the political fashions of the day may also lessen its impact. As a consequence, an inquiry cannot be expected to do everything, or to do everything equally well. This is not to say that parliamentary reports are fated to fall short, or that falling short necessarily undermines their value. Whether or not they “fall short” depends, of course, on the standard employed; as indicated earlier, we believe that an ideal academic standard – itself only sometimes fully met – would be inappropriate if applied to a parliamentary inquiry. What is important is that the inquiry helps to move a particular issue into the political spotlight, and increases the chance that policy-makers will place it on their list of areas for consideration and reform.

A crucial determinant of the scope of this inquiry was the fact that the Committee had to focus on the *constitutional* implications of surveillance and data processing. In practice, this meant that the Committee had to confine itself to the question of whether the growth of surveillance and data collection had led to any significant change in the constitutional landscape of the UK, or posed any threat to the relationship between the government and the parliament, or between citizens and the state. Given that the UK lacks a written constitution, there will almost always be some uncertainty associated with the framing of the “constitutional questions” that should form the basis of any such inquiry. In addition, the Committee must always be careful to ensure that it does not intrude upon the remit of other parliamentary committees, or frame its terms of reference in such a way as to imply that it has granted itself some sort of roving brief. The Committee was also, understandably, restricted to considering the situation in the United Kingdom. However, it was interested in learning lessons from comparable overseas jurisdictions, and as such took evidence from foreign experts and undertook a research trip to Canada and the United States.

Advisers to inquiries are typically drawn from the academic world, although in some cases they may be experts or practitioners from the private sector. It is important to note that the role of the adviser is an unusual one, and not akin to a project’s principal investigator or a contract researcher. The main roles of the adviser – and in this case, we were the Specialist Adviser and Specialist Legal Adviser respectively – are to help select witnesses, formulate questions for evidence sessions, collate and analyse the evidence, and to draft the final report in conjunction with the clerks to the Committee. Of course, this somewhat bland textbook description of the role of the adviser does not tell the whole story. Like the “anonymous” parliamentary clerks who work throughout Westminster, the convention is that advisers are just that – individuals who serve the Committee, and who should only offer their professional opinions when specifically called upon to do so. As former advisers, we are unfortunately not in a position to say much more about our roles, or to reveal the confidential deliberations of the Committee.

We hope this brief explanation of how parliamentary inquiries are conducted will help to shed new light on the strengths and limitations of the House of Lords Surveillance report. When all goes well – and the political winds are blowing in the right direction – reports can have a marked influence on policy development, albeit often in unexpected and subtle ways. That the influence of such reports is often indirect and incremental, however, also says as much about the process of policy-making as it does about the system of parliamentary inquiries. In any event, we hope that anyone reading between the lines of this explanation may find an answer to some of the charges that have been levelled at the report, both by our commentators in *Surveillance & Society* and by others in the academic, political, and NGO communities. We now turn to the four individual contributions. It is important to note that we do not intend to say anything substantive about the subject of surveillance, although we agree that there is scope for developing a more detailed analysis of the regulation of surveillance in the UK and elsewhere. Equally, we do not attempt to respond to all of the issues raised by the commentators, but instead confine ourselves to those we found the most challenging and thought-provoking.

We share Oscar Gandy's concern that various forms of surveillance might have discriminatory effects. We have argued elsewhere<sup>2</sup> that an undue focus on an individualistic, rights-based paradigm of privacy can draw attention away from the negative effects of surveillance on certain social groups. Although the report acknowledges and illustrates this point, it is true that the issue of discrimination is not systematically explored across the board. As regards the question of surveillance-driven discrimination in the private sector, and the dangers associated with commercialisation of transaction and personal data, Gandy is also right to say that this is a serious problem about which the report says little. Instead, the report explores these issues in a general sense, restricting itself to a broad discussion of the potential problems associated with data collection and sharing in the public sector. Although we cannot comment on how the Committee chose to focus on some things and not others, it is clear that this limitation is in part a product of the need to "stick to the evidence" mentioned earlier, and in part a reflection of the focus upon the constitutional implications of information-processing developments in the state, rather than the effects of commercial practices. The Committee took very little evidence on this topic: while a few witnesses drew attention to the dangers of discrimination, none was in a position to provide a systematic account of the problem. As a consequence, it would have been difficult for the report to make specific recommendations on this point. Aside from the fact that hindsight is a wonderful thing – one could argue that more should have been done to solicit empirical evidence on this important subject – it is important to note that Committee received only fragmentary written submissions and oral evidence on the question of discrimination. In light of this, it is possible to argue that the report – perhaps inadvertently – highlights a pressing need for more empirical research in this area. While surveillance scholars have been plausibly arguing for many years that surveillance can be discriminatory, there is in fact rather little systematic, empirical evidence available in support of this claim about the effects of certain information practices. If policy-makers are to take this problem more seriously, they will need more to go on than theories or a patchwork of relatively small research case studies.

In contrast to Gandy, Katherine Hayles commends the report for recommending that the Information Commissioner be given stronger powers to inspect private-sector data processing. We agree that recognising that privacy can be a social good, and not just an individual right, is highly desirable. The report is not, however, anchored in the "right to be let alone" formulation of Warren and Brandeis, and recognises that such a definition is too concise and too limited. Instead, the Committee found Calcutt's suggestion that privacy is best viewed as an individual right against intrusion very "helpful," if not necessarily definitive. Yet while it is true that the report does not explore alternative conceptual approaches, it is because there seemed to be little to be gained in chasing after definitions, or in trying somehow to end the debate over the meaning of privacy. Her inventory of what "privacy" means – the presumption of freedom from overlooking, control over our own data, and the observance of private/public spatial boundaries – is, we think, encompassed by the report, although the part played by these elements in a conceptualisation of privacy is not straightforward.<sup>3</sup> The report also approaches the idea of "surveillance" in largely neutral terms, noting that surveillance has both costs and benefits, and that the key question is how best to regulate such activity in line with demands of the law, the constitutional framework of the UK, and public expectations. In addition, the report recognises the importance of ensuring that surveillance activities are carried out in accordance with emerging human rights principles, such as the tests of necessity and proportionality. According to the report, existing privacy regulations are an established part of the legal landscape that could, if effectively strengthened and repositioned, both bolster individual rights and – as Hayles suggests – help advance the cause of the disadvantaged and society more generally.

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<sup>2</sup> Bennett, C.J. and Raab, C.D. 2006. *The Governance of Privacy: Policy Instruments in Global Perspective*, Cambridge, MA: MIT Press; Goold, B.J. 2009. Surveillance and the Political Value of Privacy. *Amsterdam Law Forum* 1(4), <http://amsterdamlawforum.org/>

<sup>3</sup> Solove, D.J. 2002. Conceptualizing Privacy. *California Law Review* 90: 1087-1155; Nissenbaum, H. 2004. Privacy as Contextual Integrity. *Washington Law Review* 79: 101-39.



Although Hayles is right that the potential implications of radio-frequency identification (RFID) deserve to be more fully discussed, given that the report could not address every concern equally, it is understandable that this particular topic did not receive more attention. As ubiquitous computing, ambient intelligence, and nanotechnologies are still emerging areas, they are perhaps less urgently in need of political and constitutional consideration than established technologies like CCTV, data mining, and DNA profiling. More importantly, they are also highly technical areas of interest that lie well outside the expertise and resources of a Committee appointed to focus on legal and constitutional matters. Hopefully, however, these are topics that will soon be taken-up by parliamentary committees specifically devoted to scientific and technological developments. That said, the report's recommendations for privacy impact assessment might promote serious scrutiny of the problems these technologies may pose for individuals and society before they are applied.

Turning to the comments of Katja Franko Aas, it is difficult to know how to respond to the complaint that the report suffers from a form of "methodological nationalism." Given that the report is the product of a parliamentary committee, it is hardly surprising that it is primarily (although not exclusively) concerned with surveillance and data collection in the UK. To criticise the report for being overly parochial, therefore, is perhaps a little unfair. Equally, although the question of whether the UK is an "anomalous surveillance outlier" is an important one, it would have been extremely difficult for the Committee to address this question in any meaningful way without devoting a great deal of its (very limited) time to a detailed comparative analysis of the social and political dimensions of surveillance in a wide range of countries. Although the report does spend some time drawing comparisons with policies and practices in other countries, even in the context of a relatively long inquiry these comparisons could only ever be illustrative. As regards the question of cross-border flows of personal information, this is an issue that has been considered by a number of other parliamentary committees – that have produced reports on EUROPOL, FRONTEX, the Prüm Treaty, and the Passenger Name Record (PNR) agreement. As a consequence, the Constitution Committee was keen to avoid returning to ground that had already been recently covered. While Aas is right that the report is "silent" as to the surveillance of non-citizens, it can be argued that this reflects a failure to disaggregate more generally rather than a desire to ignore the specific problems facing non-nationals. As Aas acknowledges, the report does in fact note that certain groups – such as children – are especially vulnerable to forms of discrimination resulting from data collection and processing, and that surveillance is not experienced uniformly by all individuals or groups in society.

Although we do not think that Aas was suggesting some malign motive, the claim that foreign citizens were "systematically" omitted from discussion is not one that bears any serious scrutiny. Moreover, we are not convinced that the report adopts an orthodox "surveillance threatens freedom" approach, or that "the standard liberal language of freedom and individual self-determination" is no longer potent in terms of law and regulation. Although surveillance's potential for social sorting, exclusion and discrimination should never be ignored, given that the report was concerned to explore the constitutional implications of surveillance and its effects on the relationship between the citizen and the state, it is little wonder that it spends considerable time on issues of individual freedom and, in particular, the problem of how best to regulate the use of state power.

We are similarly puzzled by Mark Andrejevic's reading of the report, and in particular his charge that it falls prey to a simplistic "freedom/liberty v. surveillance" view of the issues. Contrary to his suggestion, the report is far from reductive, and goes to considerable length to avoid such hackneyed narratives. If anything, Andrejevic's criticism seems to be based on the use of terms like "freedom" and "liberty" in the media's coverage of the report, and in letters written to newspapers like *The Times*. The Constitution Committee cannot, of course, be held responsible for the fact that some commentators have used the report and its critique of surveillance as an excuse to stir up animosity towards the current Government or the state more generally. In any case, it is worth noting that *The Guardian* – a centre left publication – has been at the forefront of campaigns against the erosion of liberties attributable to excessive state surveillance, and has published many letters in support of the Committee's general conclusions. Further,

we are not sure whether Andrejevic's remark about the "simplified neo-libertarian equation of state monitoring with authoritarianism" is intended to refer to the report, although the context in which it arises suggests that it is. If so, this suggests a somewhat surprising misreading of the report. As mentioned earlier, the report is not inherently hostile to surveillance, nor does it blithely assume that particular types of surveillance are necessarily good or bad. Instead, it acknowledges a tension between the state's demand for more surveillance and monitoring, and the need to ensure that surveillance systems operate in accordance with established democratic values.

Andrejevic also regards the report's failure to examine the "privatization of interactive spaces" as a surprising "blind spot." We are not entirely clear what distinctions, if any, he is drawing between problems caused by specific invasions of privacy and those caused by the more general, commercial surveillance practices of the private sector. Nonetheless, he asks a number of important questions – about appropriate levels of targeting and the need for public policy to determine how autonomy can be safeguarded – which deserve attention. However, we are not certain that "collective autonomy," with its overtones of privacy as a social good, is the best term to describe regulatory policy in this field. Furthermore, this is a subject that has already been tackled in national, sub-national and international policy arenas for about 40 years; it does not require a parliamentary report to reinforce the need for policy solutions.

As noted at the outset, we are pleased that all four commentators find much that is good in the report and appear to believe that, despite its flaws and limitations, it makes a contribution to the surveillance debate. For readers of and contributors to *Surveillance & Society*, we share Aas' hope that the report will "function as a backdrop for self-reflection...to the growing field of surveillance studies." We also agree with Andrejevic that the report's call to schools, learned societies and voluntary organisations to engage in public discussion of the risks and benefits of surveillance is an important one. It is also our hope that the report will provide a touchstone for privacy advocates and NGOs concerned about privacy and human rights. By asserting that "privacy and the principle of restraint in the use of surveillance and data collection powers are central to individual freedom,"<sup>4</sup> the report rightly identifies privacy as essential to the proper functioning of the state, and to the maintenance of a healthy relationship between the powers of government and the needs of the governed. Although the present government may not act on all – or indeed the majority – of the recommendations contained in the report, by helping to place issues of surveillance and privacy more clearly on the political map, *Surveillance: Citizens and the State*, we believe, represents a substantial contribution to an important debate, and should provide a solid foundation for progressive policy-making and law reform for years to come.

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<sup>4</sup> Second Report of Session 2008-09, HL Paper 18-I, paragraph 13.